

was proved; and that there was a good legal and equitable consideration to sustain it. In the course of the argument, they cited the following authorities. *Cro. E.* 543. 703. 1 *Com. Dig.* 199. 5 *Mod.* 411, 412. *Cro. E.* 67. 70. 3 *Burr.* 1666. 1 *Com. Dig.* 200. 1 *Bac. Abr.* 267. *Com. Rep.* 99. 12 *Mod.* 457. 1 *Pow. Cont.* 344. 1801.

The defendant's counsel (*Dallas*) contended; that whatever might be the impressions, or inferences, of the referees, the declaration of *M^r Lure* did not, in itself, amount to an express *assumpsit*; that it was not a case, in which an implied *assumpsit* could be raised; that, at most, it was a mere gratuitous undertaking without any possible consideration; beneficial to *M^r Lure*; a *nudum pactum*, on which no action could be maintained; and that the consideration was not proved by the evidence, as it was laid in the declaration. 2 *Bl. Com.* 445. 3 *Bl. Com.* 159. *Bull. N. P.* 147. *Bulstr.* 120. *Dyer*, 272. 2 *Burr.* 1666. *Cro. E.* 79. 2 *Burr.* 1671.

The COURT delivered a charge to the jury, in which they stated, that the smallest spark of benefit, or accommodation, was sufficient to create a valid consideration for a promise; and intimated that their opinion was decidedly in favour of the plaintiff. (1)

Verdict, accordingly, for the plaintiff.

The Commonwealth *versus* Dallas, Attorney of the United States, &c.

QUO Warranto. The President having honoured the defendant with an appointment, as attorney of the *United States*, for the Eastern district of *Pennsylvania*; and the Governor having been pleased, also, to appoint him Recorder of the City of *Philadelphia*; it was thought, by some of the members of the Select and Common Councils, that the tenure of these offices, by the same person, at the same time, was constitutionally incompatible. And, in order to try the question, Mr. *Hopkinson*, the solicitor of the corporation, was instructed to move the Supreme Court, for leave to file an information, (on the relation of the Select and Common Councils) (2) in nature of a writ of *quo warranto*, to inquire by what authority the defendant exercised the office of Re-

(1) BRACKENRIDGE, *Justice*, seemed to dissent from the opinion of the Court, with this remark: "The *English* books say, that there must be a spark of consideration (though a single spark is enough) to maintain an action upon a promise: but, in this case, the Court have blown out the spark; and I cannot perceive, whence they get light sufficient to enable them to decide for the plaintiff."

(2) The Court declared, that upon a proceeding of this kind, it was necessary to name the relator, at whose instance it was instituted

order.

1801. corder. It was agreed, that the merits of the case should be discussed and decided upon this preliminary motion, in order to avoid any public inconvenience; as the defendant declared his determination not to act as Recorder, while a doubt rested upon his right.

The case turned, principally, on the construction of the 8th section of the 2d article, of the constitution of *Pennsylvania*; which is expressed in these words: "No member of congress from this state, nor any person holding, or exercising, any office of trust or profit under the United States, shall, at the same time, hold or exercise the office of judge, secretary, treasurer, prothonotary, register of wills, recorder of deeds, sheriff, or any office in this state, to which a salary is by law annexed, or any other office which future legislatures shall declare incompatible with offices or appointments under the *United States*."

The argument was conducted, with great and equal ability and candour, by Messrs. *Hopkinson*, *E. Tilghman*, and *Lewis*, in support of the motion; and by Messrs. *Ingersoll* and *M'Kean*, against it.

In support of the motion, it was stated, as a foundation, that the Recorder of the city of *Philadelphia* is a *Judge*; and, consequently, within the clause of the constitution, which excludes an officer of the *United States*, from holding, or exercising, the office of a judge, in this state. It was said, that the policy of the exclusion, originated in a jealousy, lest the federal government, should overshadow the state governments; and, if there was a doubt upon the subject, that policy required a decision, affirming the incompatibility of the offices in question. The commission, duties, and powers, of the Recorder were then analysed, with a view to prove that his office was of a judicial character; particularly when he acted as the organ of the mayor's court; and that it was not the name (as a recorder, a justice, &c.) but the duty, which constituted a *Judge*. 2 *State Laws*, 658. s. 14. *Ibid.* 660. s. 19, 20. *Ibid.* 662. s. 22. *Const. Penn.* art. 5. s. 1. 4 *State Laws*, 75. Nor, it was insisted, did he merely perform his judicial functions as a ministerial agent of the corporation; but he was, in fact and in law, a judge within the meaning of the constitution, and the interpretation of the most authoritative writers. *Con. Law Dict.* "*Judge*." *Johnson's Dict.* "*Real*." *Jac. L. Dict.* "*Judge*." 1 *Bl. Com.* 269. 4 *vol.* 84. 125. 1 *Bac. Abr.* 3 *Bl. Com. in App.* 3. 38—40. 4 *Inst.* 73. 23. 6 *Co.* 20. 9 *Co.* 118. 1 *H. Hist. P. C.* 231. *Cro. C.* 146. 1 *Bl. C.* 269. 12 *W.* 3. 1 *Geo.* 3. 1 *Tidd.* 426. *Min. of Conv.* 81. 85. 138, 139. 194. 198.

In opposition to the motion, it was premised, that further than the constitution has prescribed, a spirit of jealousy, between the federal and state governments, ought not to be encouraged: and the

the argument was pursued upon the following general propositions: 1801.

1st. That the 8th section of the 2d article of the constitution, does not include in its prohibition, any other than the *state officers*. 2dly. That the Recorder of the city of *Philadelphia* is not an officer of the commonwealth, or state; but an officer of the corporation. 3dly. That the Recorder, according to the letter, the spirit, and the meaning, of the constitution, is not a judge. The following books were cited on these several propositions: *Min. Coun. Cens.* 139, 140, 141, 142. 2 *State Laws*, 546. 334. 565. 634. 636. 658. *Const. Penn.* 1776. ch. 2. s. 9. 2 *State Laws*, 654. s. 1. s. 14. 4 *Bl. Com.* 84, 5. 126. *Cro. C.* 373. 1 *Hale. P. C.* 58. 440. 1 *H. P. C.* 231. 9 *Co.* 118. b. 2 *T. Rep.* 37. *Cro. C.* 138. *Sir W. Jones*, 193. *Cro. E.* 76. 3 *Burr.* 1615, 1616. 1 *Sid.* 305. *Doug.* 382. 2 *T. Rep.* 88. *Priv. Lond.* 16. 23. 25. 63, 64. 1 *Kyd*, 426. 2 *Kyd*, 80. 82, 83. 1 *Bl. C.* 76. 3 *Bl. C.* 334. 60. 6 *Co.* 20. *Cro. C.* 146. 9 *Co.* 1186. *Stra.* 1103. 1 *Burr.* 542. 12 & 13 *W. 3. c. 2. s. 3.* 1 *Geo.* 3. c. 23. *Min. Conv.* 39. 63. 78. 82. 126. 138.

The argument was, unavoidably, protracted till late in the last day of the term; and the Judges, declaring that the question was of too much importance to be decided without deliberation, directed a *curia advisare vult* till the next term; when the unanimous opinion of the Court, was delivered by

SHIPPEN, *Chief Justice*: That although the Recorder of the city of *Philadelphia* possesses some powers, and performs some duties, of a judicial nature, he is not a judge, within the terms, spirit, and meaning, of the 8th section of the 2d article of the constitution.

The motion, for leave to file an information, in the nature of a *quo warranto*, was, therefore, refused.